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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 731

ROY BARTELS, ED BARTELS, CARL BARTELS AND JUSTIN CONLON, d/b/a CRYSTAL BALLROOM, PETITIONERS

v.

E. H. BIRMINGHAM, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE STATE OF IOWA, RESPONDENT

AND

GRIFF WILLIAMS, BILL CARLSEN, TINY HILL, BOYD RAEBURN, BUDDY FISHER AND PAUL MOORHEAD, INTERVENERS, RESPONDENTS

No. 732

LARRY V. GEER AND MARGARET GEER, d/b/a LARRY GEER BALLROOMS, PETITIONERS

v.

E. H. BIRMINGHAM, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE STATE OF IOWA, RESPONDENT

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Roy Bartels, Ed Bartels, Carl Bartels and Justin Conlon, members of a co-partnership doing business as Crystal Ballroom, Petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered on Sep-

tember 25, 1946, in the cases numbered and entitled on its docket, No. 13124, E. H. Birmingham, etc., Appellant, v. Roy Bartels, et al, Appellees, and No. 13127, Griff Williams, et al, Appellants, v. Roy Bartels, et al, Appellees; and Larry V. Geer and Margaret Geer, members of a co-partnership doing business as Larry Geer Ballrooms, Petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered on September 25, 1946, in the case numbered and entitled on its docket, No. 13125, E. H. Birmingham, etc., Appellant, v. Larry V. Geer, et al, Appellees, which judgments reversed a decision of the District Court of the United States for the Southern District of Iowa and remanded the causes for further proceedings in conformity with its opinion.

OPINIONS BELOW.

The opinion of the District Court (R. 654-662) is reported in 59 F. Supp. 84. The majority opinion of the Circuit Court of Appeals (R. 682-698) is reported in 157 F. 2d 295 and the dissenting opinion of Circuit Judge Gardner (R. 698-709) is reported in 157 F. 2d 305.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

These actions were brought in the United States Court for the Southern District of Iowa by petitioners for refunds of social security and employment taxes with respect to the services of eleven orchestras which furnished music for public dances held at petitioners' ballrooms during the years 1940, 1941 and 1942. The cases were consolidated for trial in the district court (R. 48) and for hearing of the appeals in the Circuit Court of Appeals. (R. 675)

The leaders of the six orchestras involved in the *Bartels*

case intervened in that action. (R. 20-36) Griff Williams, one of the interveners, is the same Griff Williams whose orchestra was involved in a case of *Williams v. United States*, 126 F. 2d, 129 (C.C.A. 7th, 1942), certiorari denied, 317 U.S. 655; 63 S. Ct. 52, 87 L. Ed. 527 (R. 329), wherein Williams, and not the establishments at which his orchestra played engagements, was held to be the employer of the members of his orchestra for social security tax purposes.

The leaders of the orchestras involved in the *Geer* case did not intervene in that action. Their names are Al Menke, Les Hartman, Jimmy Barnett, Paul Moorhead, Blue Barron and "Doc" Lawson. (R. 289, 290)

The evidence upon the trial disclosed that the orchestras were traveling orchestras which the ballroom proprietors secured through negotiations with either booking agents or the leaders. (R. 312, 313) No negotiations were had with the members of the orchestra (R. 52, 312), known in the trade as "sidemen." (R. 448) These traveling orchestras usually held forth in single evening performances in what are known as "one night stands." (R. 331)

Each of the orchestras was organized and established as a permanent enterprise many years prior to its engagement for petitioners. (R. 70, 71, 132, 162, 259, 311 and 329) Each leader conducted his orchestra as an independent business and held himself out to the public as ready, able and willing to serve anyone who might desire engagements. (R. 126, 127, 259, 330 and 331) The name of each leader and his orchestra and his particular style of music was extensively advertised either by the leader or his booking agent. (R. 134, 259, 312, 339-341, Pltfs.' Ex. B-25, R. 261 and 260, Pltfs.' Ex. C, R. 403-414, 338) Each orchestra operated over a wide territory in which it was well known, having played engagements therein for various ballrooms, hotels, amusement parks, clubs, lodges, city fire and police departments, American

Legion Posts, fairs, college groups, high school classes and civic organizations. (R. 71, 127, 162, 163, 259, 265, 330, 331 and 442)

The services of each orchestra consisted of the playing of popular dance music in a distinctive style, as developed and determined by the leader in order that his name and the name of his orchestra might acquire and maintain a reputation and receive public approval and acceptance throughout the territory in which it played. (R. 73, 74, 131, 165, 253, 271, 281) The leader in the case of each orchestra selected the musicians, instrumentation and musical arrangements which he thought would enable the orchestra to produce, under his direction, the particular style of music he had in mind. (R. 131, 165, 271, 352) He trained and rehearsed the sidemen for the purpose of accomplishing this result, and in the playing of an actual engagement he led and directed them in the manner of their performance so as to make sure that they played the distinctive style of music by which the leader and his orchestra had become identified in the minds of the public. (R. 131, 132, 165, 276, 352, 353)

Prior to engaging each of the orchestras, petitioners were familiar with the reputation and special quality of music of each leader's orchestra. (R. 53, 54, 74, 312) In each instance petitioners relied on the leader of the orchestra to bring to their respective ballrooms an established organization composed of musicians selected and rehearsed by him and capable of performing the orchestra's distinctive style of music with which petitioners were familiar. The reputation and public acceptance of such "Name Bands" were the things which caused petitioners to agree to pay the price for the engagement demanded by the leader or his booking agent. (R. 54, 74, 313)

The sidemen of the orchestras were selected and hired by the leaders (R. 131, 132, 164, 270, 346, 347) and were dis-

charged by the leaders. (R. 133, 161, 271, 349) Petitioners never hired or discharged any sideman of any of the orchestras and never had any conversation with any leader or sideman about hiring or discharging the latter. (R. 66, 73, 326, 327) Nor did petitioners believe that they had the right to discharge any sideman. (R. 66, 67)

The salary or wages of each sideman of an orchestra, the length and terms of his employment, were fixed and determined by the leader at the time he made his hiring arrangement with such sideman (R. 136, 164, 272, 281, 346, 347), which was months and even years prior to the orchestra's engagement at petitioners' ballroom. (R. 132, 163, 270, 348, 349) Usually the compensation which the leader agreed to pay his sidemen was a flat weekly salary (R. 136, 158, 168, 272, 326) which the leader was bound to pay regardless of whether the orchestra played engagements. (R. 136, 151, 152, 272) Some of the leaders kept a written payroll record showing the names of the sidemen and the amounts of their weekly salary. (R. 137, 168, 281, and Pltfs.' Ex. B-1, R. 173, 170) The payment of the sidemen's compensation was in some instances made by means of a check drawn on the leader's bank account. (R. 136, 360, 361)

Petitioners never had any conversation with any leader or sideman of any orchestra regarding the compensation of the latter (R. 65, 73, 324), did not know the amount thereof or its manner of payment (R. 65, 73), and had nothing whatever to do with determining said amount. (R. 75, 98, 325, 326)

The gross contract price for each engagement was determined through barter negotiations between petitioners and leader or his booking agent. (R. 52, 73 and 266) This price was never paid by the petitioners to the sidemen but was always paid to the leader or his agent. (R. 60, 65, 75, 76, 135, 276, 322) The residue of the contract

price after the leader's payment of the compensation of the sidemen and other expenses of the orchestra, such as commissions, traveling and miscellaneous expenses, belonged solely to the orchestra leader. (R. 138, 168, 277, 361, 362) In the event no residue remained and there was a loss on the engagement, the leader alone, and not the sidemen, stood such loss. (R. 138, 277, 362)

With respect to the performance of each orchestra engagement, the leader directed the sidemen, dictating such matters as the style of music, its length, tempo and volume. (R. 55, 56, 73, 275, 315, 320, 321, 353-355) He owned the musical library of sheet music used by the orchestra and designated the various selections to be played therefrom (R. 58, 73, 133, 165, 271, 272, 350), determined the instrumentation of the orchestra (R. 56, 73, 133, 165, 275, 315, 352), determined the number of sidemen in the orchestra (R. 54, 73, 132, 151, 152, 164), prescribed and furnished the form of attire worn by the sidemen (R. 135, 166, 275, 314, 357), provided the music racks and public address system used by the orchestra in playing the engagement (R. 56, 57, 73, 135, 166, 275, 276, 319, 356), provided and arranged for the means of transportation to and from the engagement (R. 74, 135, 166, 167, 276, 313, 357), determined the placing of the musicians on the bandstand (R. 314, 356), conducted rehearsals of the orchestra prior to the engagement (R. 134, 135, 165, 166, 276, 355, 356), and planned and directed the presentation of any featured numbers. (R. 134, 321, 355)

Petitioners never gave any directions or instructions, either oral or written, to the leader and sidemen of any orchestra (R. 108, 315, 319); nor did petitioners believe they had the right to give such directions or instructions. (R. 102, 103, 318)

All of the orchestra engagements except that of Griff Williams and his orchestra at the Crystal Ballroom on

October 13, 1940, were "booked" through the use of what is known as the Form B contract. After the *Bartels* action was commenced defendant conceded in his answer that Griff Williams and his sidemen were not the employees of the Crystal Ballroom owners during this particular engagement. (R. 19)

The Form B contract above mentioned was a standard form of contract prepared by the American Federation of Musicians during late 1940 and early 1941 (Pltfs.' Ex. B-37, R. 583, 585, 582) at a time when orchestra engagements under an earlier federation official form of contract (Pltfs.' Ex. A, R. 399, 348) were being litigated in *Williams v. United States*, supra.

An order of the International Executive Board of the Federation promulgated by James C. Petrillo, as president, prescribed the Form B contract as the form of contract required to be used for all orchestra engagements "for the purpose of protecting our members under the Social Security Laws." (Pltfs.' Ex. B-37, R. 587, 582) In another statement announcing this new form of contract, Petrillo said: "All members of the Federation of Musicians are herewith instructed that, at the expiration of their present contracts with hotels, cafes, restaurants, etc., this standardized form of contract be accepted and put into force, and from then on the contractor or leader will not be held responsible for the payments of social security tax on such engagements." (Pltfs.' Ex. B-37, R. 585, 582)

Although the Form B contract purported to cover an arrangement whereby an engagement was booked for the members and leader of the orchestra severally, no new or different arrangement or contract was made with booking agencies for the purpose of causing those arrangements to conform to the recitals of the contract. (R. 444, 445, 454, 455, 477) For example, the same identical contract between Griff Williams and Music Corporation of

America remained in force and effect when both of the contracts for his different engagements at the Crystal Ballroom were made and when both engagements were played. (R. 454, 455, Pltfs.' Ex. N, R. 461-467, 455) This booking agency contract repeatedly refers to the employer-employee relationship between Griff Williams and the sidemen of his orchestra.

The Form B contract referred to the establishment owner as the "employer" and to the orchestra members, including the leaders, as "employees." The place, date, hours of work, agreed lump sum price and time of payment were specified. The contract contained a recital that "the employer shall at all times have complete control of the services which the employees will render under the specifications of this contract." (R. 12-14)

Although the Form B contract further provided that the leader should list on the reverse side or on a separate memorandum to be supplied the establishment owner the amount paid sidemen and to take and turn over to the establishment owner their receipts therefor, this provision was seldom complied with. The sidemen's receipts were never given the petitioners. (R. 65, 73, 98, 325) No separate memorandum was ever given the Geers (R. 325), and in only one instance was such a memorandum given the owners of the Crystal Ballroom. (Pltfs.' Ex. A-1, R. 99, 100, 98) The only contracts in the *Bartels* case listing any information on the reverse side were the contracts for engagements by Buddy Fisher and His Orchestra and Tiny Hill and His Orchestra (R. 97), and in the latter instance such information is incomplete. (Pltfs.' Ex. S, R. 83, 85, 82, Pltfs.' Ex. T, R. 87, 89, 82) The only leader in the *Geer* case who consistently listed on the contract the sidemen's names, social security numbers and the purported wages was Paul Moorhead and, significantly, even in this instance the amounts of wages so listed did not correctly state the

sidemen's actual compensation, the amounts specified being $5.00 a man for week day nights and $6.00 a man for Sundays (Pltfs.' Ex. B-6 to B-21, both incl. R. 177-251, 176) these sums being merely the union minimum scale (R. 325), whereas Paul Moorhead was paying his sidemen substantial sums above union scale during the period when the engagements were played. (R. 258)

When Roy Bartels, one of the petitioners, received one of the first Form B contracts from the booking agency which booked a number of the engagements at his place, he objected to its provisions referring to him as the employer and was told by that agency to go ahead and sign it, that it was just a change that had been requested by Petrillo, and that it would not change his status a bit. (R. 116) Because of this fact and the fact that he knew by-laws of the American Federation of Musicians made a part of the Form B contract, referred to the leader as the employer of the sidemen, Bartels did not believe at the time he signed the Form B contract for an orchestra engagement that such contract made him the employer of the orchestra members (R. 116-118, 121, 122) even though he was aware that such contract contained other recitals to that effect. (R. 101) Bartels was also told by the above mentioned booking agency that unless he signed the Form B contract he could not get the orchestra. (R. 53)

The same orchestras which played the engagements that are involved herein and were booked through the use of the Form B contract had previously played at petitioners' ballrooms in engagements antedating the promulgation of the Form B contract. (R. 53, 70, 102, 311, 327, 334) The manner in which the orchestras operated and the conduct and practices of the parties were the same in the case of the engagements booked under the Form B contract as they were in the case of the engagements for petitioners prior thereto. (R. 102, 139, 253, 277, 327, 364, 365)

All of the leaders and sidemen of the orchestras involved in these actions were members in good standing of the American Federation of Musicians. (R. 653) The Form B contract contains an express provision making all of the rules, by-laws and regulations of that organization a part of the contract and it further provides that "nothing in this contract shall ever be so construed as to interfere with any obligation which they (member musicians) may owe to the American Federation of Musicians." (Parenthetical insertion ours). Both at the time the Form B contracts involved in these causes were made and the time the engagements specified therein were played, certain by-laws of the Federation which were previously adopted at its annual convention and officially published by its Secretary as effective for the current year contained a number of provisions obviously designed to protect the sidemen of orchestras against various practices of orchestra leaders as employers. (Interveners' Ex. 6, R. 594-599, 592, Interveners' Ex. 7, R. 540-544, 538) Many of these by-laws refer to the leader as employing the sidemen (Interveners' Ex. 6, R. 596, 598, 592, Interveners' Ex. 7, R. 541, 542, 538), and three of them expressly prohibit the sidemen from contracting with an establishment owner. (Interveners' Ex. 6, R. 596, 598, 592, Interveners' Ex. 7, R. 541, 542, 538) Oscar F. Hild, member of the union's International Executive Board, called as a witness by interveners, testified that under the powers granted him by Article I, Section 1 of the by-laws, James C. Petrillo, Federation President, took action to change these by-laws by issuing an order which he identified as a letter sent by Petrillo to all union locals, on May 1, 1941, advising them that after June 1, 1941 only the Form B contract could be used by orchestras in booking engagements. (R. 502-504, 579-582, p. 21 of Pltfs.' Ex. B-37, R. 587, 582) Article I, Section 1 of the by-laws gives the union president power to issue an executive order

which "may by its terms annul and set aside by-laws or any portion thereof." (Interveners' Ex. 7, R. 538) Although Petrillo's said letter of May 1, 1941, which was the only notice of the alleged by-law change ever given to the union locals and booking agencies (R. 590, 591), makes no mention of any by-laws and does not by its terms purport to annul and set aside any by-law or part thereof (R. 578, 579; Pltfs.' Ex. B-37, R. 587, 582), the sum and substance of the witness Hild's testimony was that he considered such letter together with the Form B contract as changing the by-laws in question. (R. 604) While Section 3 of Article I of the union's by-laws require the Secretary to publish in its official publication not later than July following adoption "all laws that have been amended, added to, or in any way changed" (Interveners' Ex. 7, R. 539, 538), the official copies of the by-laws edited and published by the Secretary in 1941 and again in 1942 contain the same verbatim by-laws as were claimed by the witness Hild to have been changed by Petrillo's said letter of May 1, 1941. (Interveners' Ex. 7, R. 541, 542, 538, Interveners' Ex. 6, R. 596, 592) In July 1944 the Secretary certified that the revision of one of these by-laws, being Section 29 of Article X, which prohibits an establishment owner from hiring the sidemen of an orchestra, was not intended to take effect until September 15, 1944. (R. 605, 606; pp. 12 and 14 of Pltfs.' Ex. B-38, R. 615, 617, 614)

The actions were tried to the court without a jury. The court on consideration of the evidence entered findings of fact (R. 662-663) as follows:

> "1. That at all times, and during the times of the performances by the several orchestras on the premises of the plaintiffs, the leaders of the orchestras exercised entire direction and control, and the right of control over their orchestras and the members thereof, and the method and manner of doing the work. Such leader exercised and had the exclusive right to

hire and fire such members, to contract for and pay their wages, and to keep all profits and sustain and pay such losses as occurred from the performances. Such leader organized, managed and controlled such orchestras as an independent organization for hire, and the true relationship as shown by the evidence was that such leaders were independent contractors and the members of the orchestras their employees within the meaning of the Internal Revenue Statutes.

"2. The contract, Form B, was not entered into by fair negotiation between the parties, but upon demand of the musician's union and the leaders of the orchestras that it must be entered into or no orchestra could be obtained, and it was required to be so executed with the avowed purpose of protecting the leader from taxes as an employer. It was required by the leader to be entered into as an anticipatory arrangement to escape taxation. There was no difference in the conduct and control of the orchestras, or the right to so conduct and control such orchestras, subsequent to June, 1941, or by reason of the Form B contract, than there was before that time, and the true relationship at all times as between the plaintiffs and such leaders was that the latter were independent contractors.

"3. At the time of the execution of the contracts, form B, neither the orchestra leader nor any of the sidemen intended thereby to transfer or give to the ballroom operators control of or the right to control the orchestra or the sidemen, or the method or manner of doing its or their work in any particular. And at the time of the execution of the contracts, Form B, the ballroom operators never intended thereby to have transferred to them or to receive or exercise the control of or the right to control the orchestras or any of the sidemen or the method or manner of doing its or their work in any particular.

"4. Considering all the facts and circumstances as disclosed by the evidence, including the contract Form B and its execution, none of the plaintiffs was at the time of the performance of the several orchestras on their premises the employer of the leader or of any of the members of the orchestras within the meaning of the Internal Revenue Statutes."

The district court on these findings concluded as a matter of law that the leaders were independent contractors and the members of the orchestras their employees within the meaning of the Internal Revenue Statutes and that none of the ballroom owners were the employers of the leader or any of the members of the orchestra within the meaning of such statutes (R. 663, 664), and accordingly entered judgments in favor of petitioners. (R. 664, 665)

After having the cases under advisement for more than eight and one-half months from the date on which they were orally submitted, the Circuit Court of Appeals for the Eighth Circuit by a divided court reversed the judgments of district court and remanded the causes. (R. 698) The majority opinion held that the Form B contract with its provisions giving the right of control of the orchestra's services to the ballroom owners established on its face the legal relationship of employer and employee as it existed at common law. Thereupon the court further held that the evidence failed to show that it was the actual intention of the parties that such right of control should remain in the leader, and that inasmuch as the evidence did not show that the contract was subsequently abrogated by the parties, the employment relationship established by the contract remained unchanged. (R. 683-698)

Circuit Judge Gardner, who dissented, was of the opinion that the findings of the trial court, including its third finding that parties at the time of the execution of the Form B contract did not thereby intend to transfer the right of control of the orchestra's services from the leader to ballroom owners, were supported not only by substantial but abundant evidence. He took the position that the Form B contract at most was simply a circumstance to be considered in determining the relationship of the parties and did not preclude the trial court from considering other facts showing their real relationship. (R. 698-708)

JURISDICTION.

The judgments of the Circuit Court of Appeals were entered September 25, 1946. (R. 709-711) The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended, 28 U.S.C., Sec. 347(a).

STATUTES AND REGULATIONS INVOLVED.

The pertinent provisions of Section 1426 (b) and 1607 (c) of the Internal Revenue Code, together with the regulations issued thereunder, are set forth in Appendix A, infra, pp. 55 and 56.

QUESTIONS PRESENTED.

1. Whether petitioners were the employers of the leaders and members of orchestras which performed engagements at petitioners' ballrooms within the meaning of Sections 1426 (b) and 1607 (c) of the Internal Revenue Code, which define employment for social security and employment tax purposes?

2. Whether a court, in determining the relationship of parties for social security and employment tax purposes, must confine its consideration solely to the provisions of a written contract which purport to vest the right of control over the services in one of the parties, or may consider other evidentiary facts which clearly establish a different relationship between the parties than that purported to be created by such provisions.

3. Did the Circuit Court of Appeals substitute its findings of fact for those of the district court supported by substantial evidence on the question of whether the parties actually intended that right of control of the orchestra's services should be in the ballroom owners and not the leader?

4. May a person who is admittedly an employer under the Federal Insurance Contributions Act and the Federal Unemployment Tax Act shift to another the tax burdens imposed on him as such employer by the simple device of merely changing the wording of their written contract without any other factual change in their relationship?

5. Whether the court below erred in holding that certain by-laws of the American Federation of Musicians recognizing the orchestra leader as the employer of his sidemen and prohibiting the existence of an employment relationship between them and the ballroom owners, were not a part of the Form B contracts involved in these actions?

6. Whether the court below erred in holding that the Form B contract on its face created the relationship of employer and employee between the ballroom owners and the leaders and members of their orchestras?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRITS.

I.

The Opinion is in Direct Conflict With the Decisions of Other Circuit Courts of Appeal.

The court below, in determining the status of the parties for social security and employment tax purposes, held in effect that their written contract conclusively establishes an employment relationship and precludes consideration of other facts clearly showing their relationship to be different than that purported to be created by such contract. The trial court arrived at exactly the reverse findings of fact and conclusions of law by giving weight and effect to facts extraneous of the contract. The holding of the court

below is in direct conflict with the following decisions of other Circuit Courts of Appeal.

(1) *Spillson v. Smith*, 147 F. 2d 727 (C.C.A. 7th, 1945).

This case, like the present ones, involved the question of whether an establishment owner was the employer for social security tax purposes of an orchestra performing engagements under a form of contract, which, like the Form B contract, was prepared by the American Federation of Musicians and sought by appropriate language to fix the relationship between an establishment owner of the leader and members of an orchestra as that of employer and employee. The lower court, like the district court in the present cases, refused to regard the written contract of the parties as conclusive, and upon an examination of the actual facts found that the leader, and not the establishment owner, was the employer of the members of the orchestra. On appeal, the Seventh Circuit Court of Appeals affirmed, saying:

> "The law is well established that the employer-employee relationship is to be judged by the presence or absence of no single evidentiary factor, but by an overall view, *Anglim v. Empire Star Mines Co.*, 9 Cir., 129 F. 2nd 914, 917. * * *"

(2) *Williams v. United States*, 126 F. 2d 129 (C.C.A. 7th, 1942).

In this case the Seventh Circuit Court of Appeals held that Griff Williams, one of the interveners in the *Bartels* case, was the employer of the members of his orchestra while performing engagements at establishments under written contracts which recited that they were the "employer". The court held that while such contracts were some evidence that Williams was not the employer, "they too, however, must give away to more decisive and persuasive circumstances", such as the fact that Williams had

the right to hire and discharge the orchestra members, fix and determine their amount of pay and method of payment, and was engaged in an independent business for profit. These are some of the same factors which the trial court in the cases at bar considered in reaching its conclusion that petitioners were not the employers of the leaders and sidemen of the orchestras.

(3) *Anglim v. Empire Star Mines Co., Ltd.*, 129 F. 2d 914 (C.C.A. 9th, 1942).

In this case the question was whether miners performing services for a mine owner under a written lease agreement were employees of the latter for social security tax purposes. This agreement gave the owner the right to inspect the work, the right to require the discharge of objectionable workmen. and the right to furnish the tools with which the work was done. The court, after examining the conduct of the parties in practice, held that the miners were not the employees of the mine owner notwithstanding the provisions of the written lease. The court in its opinion said:

> "The quality of the relationship is to be judged by the presence or absence of no single evidentiary factor, but by an over-all view."

(4) *Matcovich v. Anglim*, 134 F. 2d 834 (C.C.A. 9th, 1943).

This case involved a written contract which sought to relieve a dance hall operator from the payment of social security taxes on sums paid to taxi dancers by referring to the latter as "licensees" and reciting that such licensees were not employees of the licensor and not subject to his control. The district court held that notwithstanding these recitals other facts showed the so-called "licensor" had the right of control. On appeal to the Circuit Court of Appeals, this holding was affirmed.

(5) *Gulf Refining Co. v. Brown*, 93 F. 2d 870 (C.C.A. 4th, 1938).

While this decision involved the determination of the employer-employee relationship for tort and not social security tax purposes, the rule of law announced by the court is directly contrary to that applied by the court below in the present cases. In refusing to regard as decisive of the relationship a written contract wherein defendant company sought to vest the right to control the work of certain persons in its so-called "consignee", just as the leaders in the present cases by the Form B contract sought to vest in the establishment owner the right to control the services of their sidemen, the court in that case said:

> "It is only by consideration of all of the facts pertaining to the relationship in any case, including the provisions of the contract, the actual conduct of the parties, and the conditions of the business in which they are engaged, that it can be determined whether the distributor is endowed with that control over his own methods and means of doing the work which is the test of an independent contractor. No more definite test has been devised, and the Restatement of Agency itself, section 220 (2), merely lists certain matters of fact which, amongst others, may be considered in determining whether one acting for another is a servant or independent contractor. When these nonexclusive tests are applied to the facts of the pending case, we find confirmation of the conclusion we have reached."

Petitioners here point out that the last two cases each involved an express provision purporting to deal with the right of control over the services rendered and hence the decision of the court therein refutes the distinction which the majority opinion attempts to make between what it refers to as "specific obligations in a contract legally definitive of a created relationship" and "general recitals or descriptions." (R. 691, 692).

II.

In These Cases the Circuit Court of Appeals has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

The question presented involves a determination of the test by which the employer-employee relationship should be judged by a court for federal social security and employment tax purposes. The majority opinion in effect holds that the only fact which a court may consider in making that determination in a case where a written contract purports to vest control over the services in one of the parties is the contract itself. The minority opinion expresses the view that a court, in making such determination, may consider, in addition to the contract, such further facts as the right to hire and discharge the persons doing the work, the method and determination of the amount of the payment of the workmen, whether the person furnishing the services was engaged in an independent business for profit, whether the conduct and practices of the parties remain unchanged from what they were prior to the contract, which party actually exercised control of the means and manner of performance of the work, and which party furnished the tools with which the work was done.

The foregoing question, insofar as it pertains to social security and employment taxes, has never been passed on by this court. Unless it is settled, persons in one jurisdiction will be taxed as employers under the Federal Insurance Contributions Act and Federal Unemployment Tax Act, while persons in other jurisdictions will be relieved from such taxation even though the facts and circumstances of the respective cases are identical.

Moreover, under the holding of the majority opinion,

an employer can escape the tax burdens now imposed on him by the foregoing enactments by the simple expedient of an adroitly worded contract and at the same time retain and exercise all of the usual prerogatives of an employer, such as the control of the work being done, the right to hire and fire the men doing the work, the right to fix and determine their pay, and the right to engage in an independent business for profit, just as was done by every orchestra leader in the present cases. Certainly a question involving a doctrine of such far-reaching consequences when applied to social security and employment tax legislation should be settled by this court.

III.

The Decision of the Circuit Court of Appeals in this Case Decides a Federal Question in a Way Probably in Conflict With the Applicable Decisions of this Court.

The majority opinion holds that since the form of contract on its face establishes the relationship of the parties as employer and employee the district court could not consider what the minority opinion (R. 708) refers to as the "abundant evidence" supporting that court's findings that the leaders of the orchestras were independent contractors and the members of the orchestras their employees within the meaning of the Internal Revenue Statutes. Such evidence consisted of undisputed testimony showing facts, among others, as follows: that the leaders, and not the ballroom owners, hired and fired the sidemen (R. 131, 132, 133, 164, 270, 271, 346, 347, 349), fixed and determined the amount and method of payment of their wages (R. 136, 164, 272, 281, 346, 347), directed and controlled the manner and means of the sidemen's performances (R. 55, 56, 73, 275, 315, 320, 321, 353-355), furnished the transporta-

tion to and from the engagement (R. 71, 135, 166, 167, 276, 313, 357), and supplied all the tools with which the work was done (R. 58, 133, 135, 166, 275, 276, 319, 350, 357) excepting only the piano; that each leader was engaged in an independent business for profit from which he stood to make a gain or sustain a loss (R. 138, 168, 277, 361, 362), and that the manner in which the orchestras operated and the conduct and practices of the parties after the adoption of the Form B contract was no different from what they had been before. (R. 102, 139, 253, 277, 327, 364, 365)

While this court has not previously had occasion to apply the rule in a social security tax case, it has repeatedly held that in tax matters generally a trial court may disregard the terminology of the parties' written contract and base findings on circumstantial evidence showing the substance of the transaction or relationship to be different from that portrayed in such contract.

Commissioner v. Tower, ... U. S. . . . . , 66 S. Ct. 532, 90 L. Ed. Adv. Ops. 559.

Moline Properties, Inc. v. Commissioner, 319 U. S. 436, 63 S. Ct. 1132, 87 L. Ed. 1499.

Griffiths v. Commissioner, 308 U. S. 355, 60 S. Ct. 277, 84 L. Ed. 319.

While it so happens that in each of the above cases the rule was applied in favor of the government, there is nothing in the court's opinion to indicate that the rule is so limited, and in *Helvering v. Tex-Penn Oil Co.*, 300 U. S. 481, 57 S. Ct. 569, 81 L. Ed. 755, this court did not hesitate to apply the same rule in favor of the taxpayer.

The district court and Circuit Judge Gardner were of the opinion that the rule applied by this court in tax matters generally was applicable to the present case. Circuit Judges Johnsen and Woodrough were of a contrary opinion. It is submitted that the latter opinion decides a

federal question in a way probably in conflict with the above mentioned decisions of this court.

IV.

The Circuit Court of Appeals Has Erroneously so Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Call For an Exercise of This Court's Power of Supervision in that the Court Below Has Substituted Its Findings of Fact For Those of the District Court Supported by Substantial Evidence.

This court has repeatedly held that a Circuit Court of Appeals is without authority to weigh the evidence and substitute its findings of fact for those of the trial court supported by substantial evidence. *Great Atl. & Pac. Tea Co. v. Grosjean*, 301 U. S. 412, 57 S. Ct. 772, 81 L. Ed. 1193, *McCaughn v. Real Estate Land, Title & T. Co.*, 297 U. S. 606, 56 S. Ct. 604, 80 L. Ed. 879, and *Adamson v. Gilliland*, 242 U. S. 350, 37 S. Ct. 169, 61 L. Ed. 356. And this is true even though the evidence is open to "diverging inferences." *United States v. Jefferson Elec. Mfg. Co.*, 291 U. S. 386, 54 S. Ct. 443, 78 L. Ed. 859. The Circuit Court of Appeals has departed from this well settled rule of appellate procedure in at least two instances in its opinion in the present cases. One instance is with respect to the trial court's finding (R. 663) that there was no difference in the conduct and control of the orchestras, or the right to control such orchestras after the Form B contract than there was before that time. This finding was abundantly supported by the undisputed testimony of the leaders and ballroom owners that the manner in which the orchestras operated and the conduct and practices of the parties were the same in the case of the engagements booked after the Form B contract as they were before. (R. 102, 139, 253, 277, 327,

364, 365) The majority of opinion, having admitted that prior to such contract an orchestra leader was the employer of his sidemen (R. 687, 688) and hence possessed the right of control over them, proceeds to find that after the adoption of that contract such right was in the ballroom operators not merely as a legal but as "a practical reality as well" (R. 693), which is the equivalent of a finding that the parties had changed their conduct with respect to control of the sidemen and their services after the use of the Form B contract. Such a finding is directly contrary to the record evidence that the leaders, in the playing of engagements booked under such contract, at all times directed the performances of their sidemen, dictating such matters as the style of music, its length, tempo and volume (R. 55, 56, 73, 275, 315, 320, 321, 353-355), and the further record evidence that petitioners never gave any directions or instructions, either oral or written, to the leader and sidemen of any orchestra during the playing of its engagement (R. 108, 315, 319), and did not believe they had the right to give such directions. (R. 102, 103, 318) The finding is also contrary to one leader's testimony that both before and after the effective date of the Form B contract he did not permit an establishment owner to direct and instruct the sidemen of his orchestra. (R. 139) It is likewise contrary to the testimony of the leaders that they hired the sidemen who played the engagements (R. 130, 132, 164, 270, 346, 347), and the testimony of the petitioners that they never hired a sideman for any engagement. (R. 66, 73, 326, 327)

The majority opinion wholly ignores the foregoing mass of testimony which overwhelmingly sustains the finding of the trial court that the leader, and not petitioners, exercised the same control and right of control after the Form B contract that he did before. Instead the opinion, in order to support its contrary finding, cites an instance where

"in one of the engagements in suit the orchestra appeared without its regular piano player and the ballroom operator exercised the prerogative of selecting and requiring the leader to use a certain local musician for the performance." (R. 693) This instance which the majority opinion finds was "generally illustrative" of the fact that the right of control in the ballroom owners was a "practical reality" (R. 693) after the Form B contract is the *only instance* in the entire record in which interveners claimed any ballroom operator ever hired a sideman, and even in this instance the majority's version of what happened is directly contrary to the record testimony of Mr. Geer that he did not hire the musician in question but that the leader did (R. 321) and the record testimony of the leader wherein he refused to state that Mr. Geer hired her (R. 628) and admitted that he fixed the amount of her pay and paid her. (R. 629) Petitioners submit that in view of the foregoing record the Eighth Circuit Court of Appeals is clearly guilty of substituting its finding of fact on the matter in question for that of the trial court supported by substantial evidence, contrary to its powers as an appellate court.

The other instance wherein the majority opinion departs from the rule in question is with respect to the district court's third finding (R. 663) that the parties, at the time of the execution of the Form B contract, did not thereby intend to transfer control or the right of control over the sidemen and their method and manner of doing the work from the leader to the ballroom owners. There was not only substantial but abundant evidence to sustain this finding in the undisputed testimony of one of the petitioners that when he objected to the references to him as an employer in one of the first Form B contracts presented to him, he was told by the booking agency which represented the leader in negotiating the transaction and which booked a number of later orchestra engagements at the Crystal

Ballroom that the Form B contract was just a change that had been requested by Petrillo and that it would not change his status a bit. (R. 116) The finding is further supported by this same petitioner's testimony that he knew that certain by-laws of the musicians' union incorporated in the Form B contract by express reference referred to the leader as the employer of the sidemen (R. 120); that he didn't believe the Form B contract changed his status with the orchestra from what it had been before (R. 121); that he never understood that the terms of the contract were such that he assumed the obligations of an employer to the sidemen and the leader of the orchestra (R. 121); that in signing all the contracts he denied he was the employer (R. 122); and he never believed before or after the Form B contract that he had the right to give directions or instructions to the leader and sidemen of an orchestra in its performance of an engagement. (R. 102, 103)

Further evidence supporting the finding is the undisputed record fact that at the time the Form B contract was signed no new and different arrangement or contract was made between the leader and his booking agent, and that the then existing booking contract repeatedly referred to the employer and employee relationship between the leader and members of his orchestra. (R. 444, 445, Pltfs.' Ex. N, R. 461-467, 455, 556) Still further supporting evidence consisted of testimony of the leaders that the manner in which the orchestras operated and the conduct and practice of the parties was the same after the Form B contract as they were before (R. 139, 253, 277, 327, 364, 365), and the testimony of one of the leaders that he did not permit an establishment owner to direct the sidemen of his orchestra at any time during the period when its engagements involved herein were played. (R. 139)

In addition to this direct evidence supporting the district

court's above mentioned finding, there was also convincing circumstantial evidence consisting of the testimony of the leaders that they at all times did the hiring and discharging of the sidemen in their orchestras (R. 131-133, 164, 270, 271, 346, 347, 349), fixed and determined the amount and manner of payment of their wages (R. 136, 164, 272, 281, 346, 347), and directed and controlled their performances in the playing of an engagement (R. 55, 56, 73, 275, 315, 320, 321, 353-355), from which evidence a court could reasonably infer that the leader intended to exercise all the prerogatives of an employer including the right of control notwithstanding his execution of the Form B contract. Circuit Judge Gardner was of the opinion that this evidence was not only substantial but abundant to sustain the findings of the district court and that a finding that the contract correctly reflected the relationship of the parties would find no support in the evidence. (R. 708)

The majority opinion, while admitting that parol evidence is admissable to show that the parties intended a different agreement than that contained in their written contract (R. 690) finds that not only was there no evidence in the record showing such an agreement but that on the contrary the evidence that the ballroom operators, when the first Form B contract was presented to them, had objected to the provision giving them the legal right to control and making them the employers, and would not execute the contract until they were told that that was the only basis on which they could get the orchestra, was evidence of a specific agreement that the ballroom owners were to have the right of control. (R. 691) The fact that the person who gave the petitioners this information was the same booking agency which told them the Form B contract was just something Petrillo requested and that it would not change their status a bit, coupled with the other facts above set forth which sustain the trial

court's finding, made the real understanding of the parties in executing such contract a matter solely for the determination of that court, and the Circuit Court of Appeals has accordingly exceeded its authority in substituting its judgment respecting such matter for that of the district court.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for writs of certiorari should be granted.

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November 1946.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

SUMMARY OF ARGUMENT.

I.

The majority opinion and decision of the Circuit Court of Appeals is in error in holding that a written contract which purports to vest the right of control over the services in one of the parties conclusively establishes a relationship of employer and employee and precludes consideration of facts which clearly prove a relationship different than that purported to be created by such contract.

II.

The majority opinion and decision of Circuit Court of Appeals is in error in substituting its findings of fact for those of the district court supported by substantial evidence on the question of whether the parties actually intended that the right of control over each orchestra's services should be in the ballroom owners and not the leader.

III.

The majority opinion and decision of the Circuit Court of Appeals is in error in holding that a contract devised for the purpose of escaping liability for social security and employment taxes not accompanied by change in the actual relationship of the parties is effectual for that purpose.

IV.

The majority opinion and decision of the Circuit Court of Appeals is in error in holding that certain by-laws of

the American Federation of Musicians recognizing the leader as the employer of his sidemen and prohibiting the existence of an employment relationship between them and the ballroom owners, were not a part of the Form B contracts involved in these actions.

A.

The letter of May 1, 1941, of James C. Petrillo, President of the American Federation of Musicians, did not constitute an implied repeal of the then existing by-laws in question.

B.

Assuming Petrillo's letter of May 1, 1941 did constitute an implied repeal of the then existing by-laws in question, such repeal did not nullify by-laws of like content which were reenacted at the annual convention of the American Federation of Musicians in June 1941 and again at its annual convention in June 1942, and were therefore in full force and effect at the time each of the Form B contracts involved in these actions was executed.

V.

The Circuit Court of Appeals is in error in holding that the Form B contract on its face created the relationship of employer and employee between the ballroom owners and the leaders and members of their orchestras.

ARGUMENT.

I.

The Majority Opinion and Decision of the Circuit Court of Appeals is in Error in Holding that a Written Contract Which Purports to Vest the Right of Control Over the Services in One of the Parties Conclusively Establishes a Relationship of Employer and Employee and Precludes Consideration of Facts Which Clearly Prove a Relationship Different than that Purported to be Created by Such Contract.

Both the district court and the Circuit Court of Appeals agree that in order to constitute an employment within the meaning of the Federal Insurance Contributions Act and the Federal Unemployment Tax Act and the regulations issued thereunder, the legal relationship of employer and employee must exist between the person for whom the services are performed and the individual who performs them, and that an independent contractor is not an employee. Their point of difference arises with respect to the factors which a court may consider in determining such relationship in a case where the written contract of the parties purports by appropriate terminology to fix their status as that of employer and employee. The trial court, following what it considered to be the rule laid down in numerous cases hereinafter mentioned, held that the contract was not conclusive of an employer-employee relationship but merely, "an element that may be considered by the fact finder if of any assistance in determining what is the true relationship." (R. 660) Circuit Judge Gardner concurs in this holding. (R. 708) The majority opinion, however, takes a contrary view and holds that the parties' written contract, because it "obligationally gives complete control of the services which one

person agrees to perform for another to the person for whom the work is done" establishes on its face the legal relationship of employer and employee as it existed at common law, thereby precluding a court's consideration of other factors which show that their actual relationship was that of independent contractor.

Petitioners believe this is the first case involving the performance of services by one person for another in which any court has ever held that the parties' written contract is the sole test by which the relationship of employer and employee is to be determined. This holding is directly contrary to the view taken by the American Restatement of the Law of Agency and unanimous decisions of courts which have had occasion to consider the question. Section 220 (1) of such Restatement, Volume I, page 483, defines a servant "as a person employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the other's control or right to control." Section 220 (2) states:

> "In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered. * * *"

The section then lists *nine evidentiary factors* of which the parties' agreement respecting control over the details of the work is only one. Other facts listed as equally important are such matters as whether the person performing the services is engaged in a distinct occupation or business, the skill required in the particular occupation, the method of payment, who furnished the tools with which the work was done, and whether or not the parties believe they are creating the relationship of master and servant. These are among the very factors which the district court considered in making its findings (R. 662, 663), most of which are not even questioned by the ma-

jority opinion. That the trial court, in doing this, acted correctly is further shown by the Agency Restatement's comment on Section 220, page 484, as follows:

> "The relationship of master and servant is one not capable of exact definition. * * * *The factors stated in Subsection (2) are all considered in determining the question, and it is for the triers of fact to determine whether or not there is a sufficient group of favorable factors to establish the relationship.*" (Italics ours.)

The Agency Restatement's rule that the status of employer and employee is not to be judged by the single evidentiary factor of the parties' form of contract but by an overall view of all the facts and circumstances showing their true relationship is sustained by the decisions of courts in the following cases, wherein members of an orchestra were held to be the employees of the leader and not the establishment owner for social security employment tax purposes:

Spillson v. Smith, 147 F. 2d 727 (C.C.A. 7th).

Williams v. United States, 126 F. 2d 129 (C.C.A. 7th) certiorari denied, 317 U. S. 655, 63 S. Ct. 52, 87 L. Ed. 527.

Palmer v. Michigan Unemployment Compensation Commission, 310 Mich. 702, 18 N.W. 2d 83.

Nebraska Hotel Co. v. O'Malley, 63 F. Supp. 26 (Neb.).

In re Jermyn Hotel Company, (Pa. Common Pleas, Sept. 3, 1946) C. C. H. Unemployment Ins. Service, Pa. par. 8149.

In the last two cases above cited, which involved orchestra engagements under the same Form B contract as that involved herein, the court cited with approval the decision of the district court in the present cases.

The rule applied in the foregoing orchestra cases is sup-

ported by the uniform decisions of courts in social security and unemployment tax cases generally.

Matcovich v. Anglim, 134 F. 2d 834 (C.C.A. 9th).

Anglim v. Empire Star Mines Co., 129 F. 2d 914 (C.C.A. 9th).

Wabash R. R. Co. v. Finnegan, 67 F. Supp. 94 (E. D. Missouri).

Royal Theatre Corporation v. United States, 66 F. Supp. 301 (Kan.).

Willard Sugar Co. v. Gentsch, 59 F. Supp. 82 (N.D. Ohio).

Industrial Commission v. Northwestern Mutual Life Ins. Co., 103 Col. 550, 88 P. 2d 560.

Jack and Jill, Inc. v. Tone, 126 Conn. 114, 9 Atl. 2d 497.

In re Morton, 284 N.Y. 167, 30 N.E. 2d 369.

The rule is also sustained by the following decisions in workmen's compensation and tort cases:

Gulf Refining Co. v. Brown, 93 F. 2d 870 (C.C.A. 4th).

Bertino v. Marion Steam Shovel, 64 F. 2d 409 (C.C.A. 8th).

Sanford v. Goodridge, 234 Iowa 1036, 13 N. W. 2d 40.

Glielmi v. Netherland Dairy Company, 254 N. Y. 60, 171 N. E. 906.

Nestle's Food Co. v. Industrial Commission, 205 Wis. 467, 237 N. W. 117.

Brown v. Industrial Accident Commission, 174 Cal. 457, 163 Pac. 664.

The majority opinion, while admitting the general rule announced in the foregoing cases, holds that it is limited only to contracts containing general recitals and descriptive references and does not apply to a contract contain-

ing express obligations. (R. 691, 692) There is no foundation whatever for this novel view of the limited scope of the rule. In the first place, neither the Restatement of the Law of Agency nor any of the decisions sustaining the rule make any such distinction. In the second place, many of these decisions were in cases involving contracts which, in addition to containing general recitals and descriptive references, also contained clauses creating express obligations. For example, in *Spillson v. Smith*, supra, the orchestra contract provided that the establishment owner "was the employer to whom the musicians were directly responsible" and "any payment by the employer to the musicians' representative shall be as their agent for distribution among them." In at least seven of the cases above cited, *Matcovich v. Anglim*, *Gulf Refining Co. v. Brown*, *Wabash R. R. Co. v. Finnegan*, *Royal Theatre Corporation v. United States*, *Willard Sugar Company v. Gentsch*, *Nebraska Hotel Co. v. O'Malley*, and *In re Jermyn Hotel Company*, the contract between the parties contained an express provision dealing specifically with the right of control over the services rendered. Yet in each case the court went beyond the contract and determined the true relationship on the basis of all the facts and circumstances showing who in fact had the right of control over the work being done. The Fourth Circuit Court of Appeals, in the *Gulf Refining Co.* case, supra, in speaking of the matters of fact mentioned by Section 220 (2) of the Restatement of Agency, said:

> "When these nonexclusive tests are applied to the facts of the pending case, we find confirmation of the conclusion we have reached."

In *Williams v. United States*, supra, the Seventh Circuit Court of Appeals, in enumerating the factors, in addition to the parties' written contract, that a court may

take into account in determining who has the right of control over an orchestra's services, said:

> "A number of elements have been enumerated as bearing upon the right to control, such as the right to hire and discharge persons doing the work (*Casement v. Brown*, 148 U. S. 615, 13 S. Ct. 672, 37 L. Ed. 582; *Densby v. Bartlett*, 318 Ill. 616, 149 N.E. 591, 42 A.L.R. 1406), the method and determination of the amount of the payment of the workmen (*Simonton v. Morton*, 275 Pa. 562, 119 A. 732), whether or not the person doing the work is engaged in an independent business or enterprise and, particularly, whether he stands to make a profit on the work of those working under him (*Barnes v. Myers*, 163 Md. 206, 161 A. 279, *Petzold v. McGregor*, 92 Ind. App. 528, 176 N.E. 640), which party furnishes the tools or materials with which the work is done (*Singer Mfg. Co. v. Rahn*, 132 U.S. 518, 10 S. Ct. 175, 33 L. Ed. 440), and who has control of the premises where the work is done. *Murphy v. Herold Co.*, 137 Wis. 609, 119 N.W. 294."

Petitioners here point out that the five factors above mentioned by the Seventh Circuit Court of Appeals are the very factors to which the trial court in the present cases gave consideration, and with respect to all but one of them (control of the premises where the work was done) it found in favor of petitioners in findings which are not questioned by the court below. Surely it cannot be the law that these factors cease to have a bearing on the right to control simply because the parties attempt through the use of legalistic fiction in a form of written contract to define who, as between them, possesses such right. Take for example the right to hire and discharge the workmen. The Seventh Circuit Court of Appeals, at a later point in its opinion in the *Williams* case (p. 133 of 126 F. 2d), speaking of this right, said:

> "It is difficult to conceive of an employer-employee relationship without such a right on the part of the em-

ployer * * * Without this right there could be no effective control by an employer."

Does this right to hire and discharge in one person suddenly lose its potency as affecting the right of control in that person simply because a form of contract purports to place such control in someone else? A realistic view of the situation in the present cases requires that this question be answered in the negative. It was only through the exercise of this power to hire and fire which the trial court on undisputed evidence found the leader possessed that the latter could enforce his right to control the sidemen in the discipline, coordination of effort and standardization of performance necessary to produce a marketable musical entertainment which was what the leader was in business to sell. The possession of such power was just as real and vital to his right of control after the Form B contract as it was before. The same thing is true with respect to the other factors such as the right to fix, determine and pay the wages of the sidemen, the fact that the leader was engaged in an independent business for profit and furnished the tools with which the work was done. The majority opinion as Judge Gardner in his dissenting opinion points out "brushes aside the findings of the trial court" regarding these matters "and bases its conclusion upon the single fact that there was in form a contract which purported to fix the relationship of the parties." Under the unanimous view of the authorities, including the Restatement of the Law of Agency, this is clearly error on the part of the Circuit Court warranting a review and reversal of its decision by this court.

II.

The Circuit Court of Appeals is in Error in Substituting its Findings of Fact for those of the District Court Supported by Substantial Evidence on the Question of Whether the Parties Actually Intended that the Right of Control of Each Orchestra's Services Should be in the Ballroom Owners and not the Leader.

The majority opinion admits the parol evidence rule left petitioners "free to prove by parol, if the facts so were, that instead of the agreement having been that the legal right of control of the leader's and the orchestra members' services should be given to the ballroom operators, the agreement actually was that it would remain in the leader, or that the parties had never in fact undertaken to agree as to who should have the legal right to control." (R. 690) The opinion then proceeds to weigh the evidence and makes clear cut findings of fact in language as follows:

> "The evidence, however, in our opinion, fails to establish either of these situations in relation to the negotiation and execution of the contract. To the contrary it shows that, when the 'Form B' contract initially was presented to the ballroom operators in engaging the services of an orchestra, they had objected to the provision giving them the legal right of control and making them employers, until they were told that this was the only basis on which they could obtain the services of the orchestra, and that they thereupon executed the contract and each of the other contracts thereafter and accepted the services of the various orchestras under them. On these facts we think it must be held that the parties in their negotiation and execution of the contract had specifically agreed that the ballroom operators should have the legal right of control over the services of the leader and the orchestra-members and so had created the common-law relation of employer and employee between them, at the time the contracts were executed at least." (R. 691)

Petitioners submit that foregoing finding of fact that "the parties in their negotiation and execution of the contract had specifically agreed that the ballroom operators should have the legal right of control over the services of the leader and the orchestra members" is directly contrary to the third finding of fact of the district court as follows:

> "3. At the time of the execution of the contracts, Form B, neither the orchestra leader nor any of the sidemen intended thereby to transfer or give to the ballroom operators control of or the right to control the orchestra or the sidemen, or the method or manner of doing its or their work in any particular. And at the time of the execution of the contracts, Form B, the ballroom operators never intended thereby to have transferred to them or to receive or exercise the control of or the right to control the orchestra or any of the sidemen, or the method or manner of doing its or their work in any particular." (R. 663)

The abundant record evidence which sustains this third finding of the trial court is fully reviewed on pages 24 to 26 of the petition for writs of certiorari, making a further recital thereof at this point unnecessary. The majority opinion wholly disregards this evidence and instead singles out to sustain its own conflicting finding on the same question of ultimate fact one bit of evidence to the effect that when the Form B contract was first presented to the ballroom operators they had objected to the Form B contract until they were told that was the only basis on which they could obtain the orchestra and thereupon executed the contract. (R. 691) The majority opinion wholly ignores one very significant fact which materially changes the whole import of this evidence, namely that in the same conversation with a leader's booking agent in which the ballroom owners were given this information, they were also told by such agent to go ahead and sign the contract, that it was just a change that had been requested by Petrillo, that

it would not give the ballroom owners any more power than they had before and that it would not change their status a bit. (R. 116) In this same connection petitioners here point out that the only contracts which petitioners intended to sign were contracts containing by-laws which they knew made the leader the employer of his sidemen (R. 118, 120) and if these by-laws were not then a part of the contract which is what the majority opinion holds (R. 695, 696), then obviously there was no meeting of minds so as to create any contract for each of the engagements in question, and this fact standing alone is sufficient to sustain the district court's third finding.

In an endeavor to strengthen its finding that the parol evidence showed that the parties specifically agreed that the ballroom operators should have the legal right of control over the services of the leader and the orchestra members, the court below found that the conduct of the parties after its execution of the Form B contract showed that the right of control "did have not merely a legal but a practical reality as well." (R. 693) This finding conflicts squarely with the district court's first finding "that at all times and during the times of the performances by the several orchestras on the premises of the plaintiffs, the leaders of the orchestras exercised entire direction and control, and the right of control, over their orchestras and the members thereof, and the method and manner of doing the work" (R. 662) and its second finding that "there was no difference in the conduct and control of the orchestras, or the right to so conduct and control such orchestras, subsequent to June, 1941 than there was before that time." (R. 663) The record evidence showing that the leader and not petitioners exercised the same control and right of control after the Form B contract that he did before, and that the majority opinion's inference that petitioners once hired a piano player is without support in

the record, is fully set out in detail on pages 23 and 24 of the petition for writs of certiorari and for that reason will not be repeated here. Regarding the conclusive effect of this evidence, Circuit Judge Gardner said:

> "No case could more convincingly illustrate an agreement which purported to create a certain relationship while the actual conduct and operation of the parties established another." (R. 708)

Petitioners submit that since the findings of the trial court on the matters in question were supported by substantial evidence, the Circuit Court was without authority to weigh the evidence and substitute its own findings for those of the district court, and its action in so doing is error under the well settled rule of this court.

Great Atl. & Pac. Tea Co. v. Grosjean, 301 U. S. 412, 57 S. Ct. 772, 81 L. Ed. 1193.

McCaughn v. Real Estate Land, Title & T. Co., 297 U. S. 606, 56 S. Ct. 601, 80 L. Ed. 879.

United States v. Jefferson Elec. Mfg. Co., 291 U. S. 386, 54 S. Ct. 443, 78 L. Ed. 859.

III.

The Majority Opinion of the Circuit Court of Appeals is in Error in Holding that a Contract Devised for the Purpose of Escaping Liability for Social Security and Employment Taxes Not Accompanied by Change in the Actual Relationship of the Parties is Effectual for that Purpose.

The district court found that the execution of the Form B contract was devised by the musicians' union with the avowed purpose of protecting the leader from taxes as an employer and that "it was required by the leader to be entered into as an anticipatory arrangement to

escape taxation." (R. 663) The majority opinion of the court below, while admitting that the purpose of the contract "was to shift as nearly as possible the social security tax burden previously borne by a leader on his orchestra-members to those engaging the services of the orchestra" (R. 687), nevertheless holds that the trial court was not on that account entitled to disregard the provision therein respecting control of the orchestra's services. The first reason given by the court, that the contract does not operate to deprive the government of any taxes which it would otherwise have received, is refuted by at least two undisputed record facts, the first of which is that the orchestras in the cases at bar, like all traveling orchestras, play many engagements for civic, charitable, educational and similar organizations. (R. 71, 127, 162, 163, 259, 330, 331, 112) If these organizations, and not the leaders, are held to be the employer of the sidemen of the orchestra (which would be the result under the decision of the court below), not one penny of social security and employment tax will be paid on the sums paid the sidemen performing such engagements for the reason that Sections 1426 (b) (8) and (b) (10), Sections 1607 (c) (8), (c) (10), and 101 (6), (7), (8), and (9) of the Internal Revenue Code expressly exclude charitable and educational institutions and pleasure, business and civic clubs from coverage under the Federal Insurance Contributions and Federal Unemployment Tax Acts.

The second fact to which petitioners have reference is the fact that in the present case the only three leaders who ever bothered to furnish the ballroom owners any listing of the sidemen and their pay on the reverse side of their Form B contract, as required by its terms, each misstated and understated the actual compensation of the sidemen. While the filled-in amounts on the reverse side of Paul Moorhead's contracts (Pltfs.' Exs. B-6

to B-24, both incl., R. 177-251, 176) and on the reverse side of Al Menke's contract (Pltfs.' Ex. B, R. 145-147, 140) correspond to the minimum local union scale (R. 325); each of these leaders, at the time the engagements booked by these contracts were played, was paying his sidemen above union scale. (R. 258, 136) While one of Blue Barron's contracts lists $10.00 as one evening's wages for a sideman (Pltfs.' Ex. B-34, R. 303-305, 290), this leader was paying his men a salary of $150.00 per week. (R. 326) Since the ballroom owners had nothing to do with fixing the pay of these sidemen (R. 75, 98, 325, 326), and did not know and had no way of determining the amount thereof (R. 65 and 73), it logically follows that if they, as the employer, are required to return the social security taxes thereon, the only amounts they can report as wages for that purpose are the sums listed by the leader or his booking agent on the contract, which means that the actual amounts paid by the leader in excess of such sums will entirely escape taxation. What happened in these three instances in the cases at bar will again happen countless times if the leader is relieved from his liability as an employer to return and directly pay to the government the tax on the actual wages which he pays the sidemen of his orchestra. This is so for one reason, among others, that it is utterly impossible for a leader to state in advance how much pay each musician will receive for a single night's work when the leader pays weekly salaries and usually doesn't know exactly how many nights in any week that his orchestra will play. The foregoing facts alone furnish ample support for the trial court's finding that the Form B contract was an anticipatory device to enable the leader to escape taxation.

The second reason given by the majority opinion is that "if the legal relationship of employer and employee was created between the ballroom operators and the orchestra

members, as it was here in the circumstances of the negotiation and execution of the contract, and that relationship had not thereafter been abrogated, the ballroom operators were simply bearing the burden of the taxes which the statute imposes upon anyone who occupies an employer's status." The opinion does not state what these "circumstances of the negotiation and execution of the contract" were, but at most they constituted merely evidence conflicting with the substantial evidence on which the trial court based its first finding that the parties at the time of the execution of the Form B contract did not thereby intend to transfer the right of control over the sidemen and their work from the ballroom owners to the leaders. The voluminous record facts making up this substantial evidence have been reviewed earlier on pages 21 to 26 of the petition for writs of certiorari and need not be repeated here.

Moreover, the reasoning of the court is erroneous because it assumes that the creation of an employer and employee relationship is to be determined solely from the circumstances of the negotiation and the execution of the contract without taking into account the all-important fact as to whether or not there was any actual change in the conduct of the parties after the contract from what it was before. The authorities uniformly hold that where the sole motivation for a contract is tax avoidance without any change in the actualities of the relationship a court should disregard such contract and determine their status from the substance, rather than the form of their relationship.

Commissioner v. Tower, ...U. S. ...., 66 S. Ct. 532, 90 L. Ed. Adv. Ops. 559.

Moline Properties, Inc. v. Commissioner, 319 U. S. 436, 63 S. Ct. 1132, 87 L. Ed. 1499.

Griffiths v. Commissioner, 308 U. S. 355, 60 S. Ct. 277, 84 L. Ed. 319.

Doll v. Commissioner, 149 F. 2d 239 (C.C.A. 8th),

Matcovich v. Anglim, 134 F. 2d 834 (C.C.A. 9th).

Wabash R. R. Co. v. Finnegan, 67 F. Supp. 94 (E. D. Missouri).

Royal Theatre Corporation v. United States, 66 F. Supp. 301 (Kan.).

Nebraska National Hotel Company v. O'Malley, 63 F. Supp. 26 (Neb.).

Spillson v. Smith, (N. D. Ind.) C. C. H. Unemployment Insurance Service, Vol. 1, par. 9111.

McDermott v. Henrickson, 45 F. Supp. 277 (S. D. Wash.).

Electrolux Corporation v. Board of Review, 129 N.J.L. 154, 28 A. 2d 207.

The record evidence which brings the present cases squarely within the rule of the foregoing decisions shows that all of the orchestras had played engagements at petitioners' ballrooms prior to the Form B contract (R. 53, 70, 311), and that every one of the leaders who testified stated that there was no difference or change in their relationships with the petitioners or in the manner of performance of the engagements after the Form B contract came into use from that which existed prior thereto. (R. 139, 253, 277, 364, 365, 397) Petitioners each testified to like effect. (R. 67, 102, 327)

The majority opinion admits that prior to the Form B contract "a leader had been held to be an independent contractor and to be liable for the payment of Social Security Taxes on his orchestra-members." (R. 688) As above stated, the undisputed record evidence shows that, except for the change in the form of the contract, the facts and circumstances relating to the engagements booked under the Form B contract were the same as before that contract was devised. The correctness of the majority opinion must therefore stand or fall on the bare proposition that even though there was no material factual difference in the true re-

lationship of the parties, the mere existence of a written contract skillfully and adroitly devised to cause a shifting of a tax burden, requires a court to conclude that a new and different taxpayer is the employer. That is exactly what the courts have consistently refused to do, and, as said by the court in the *McDermott* case, supra, an original relationship once established "cannot be completely altered into something else by a mere matter of nomenclature."

IV.

The Majority Opinion and Decision of the Circuit Court of Appeals is in Error in Holding that Certain By-Laws of the American Federation of Musicians Recognizing the Orchestra Leader as the Employer of His Sidemen and Prohibiting the Existence of an Employment Relationship Between Them and the Ballroom Owners, Were Not a Part of the Form B Contracts Involved in These Actions.

A.

The Letter of May 1, 1941, of James C. Petrillo, President of the American Federation of Musicians, Did Not Constitute an Implied Repeal of the Then Existing By-Laws in Question.

The Form B contract expressly recites that "all the rules, laws and regulations of the American Federation of Musicians * * * are made a part of this contract" and expressly provides that in case of conflict between any of the provisions of the contract and the obligations of members of the union as specified in the by-laws, the by-laws are controlling. (R. 12, 13) A comparison of the Union Secretary's official compilation of that organization's by-laws for the year 1940 (Pltfs.' Ex. B-39, R. 607-614) with his official

compilation of its by-laws for the years 1941 and 1942 (Interveners' Exs. 6 and 7, R. 592-599 and 538-545) discloses that no changes whatever were made in numerous by-laws obviously enacted to protect the sidemen of orchestras against various practices of their brother members who, as orchestra leaders, were their employers, with the result that the Form B contract contains provisions which directly contradict and nullify the effect of artful language elsewhere set forth in the contract seeking to make it appear that the establishment owner, and not the leader, was the employer of the sidemen.

These by-laws are as follows:

(1) *By-laws recognizing the leader's right to hire the sidemen of his orchestra.*

Sections 24 and 27 of Article IX (Pltfs.' Ex. B-39, R. 611, 607; Interveners' Exs. 6 and 7, R. 594, 592 and 540, 538)

Sections 24, 29, 39 and 45 of Article X. (Pltfs.' Ex. B-39, R. 611-612, 607; Interveners' Exs. 6 and 7, R. 595-597, 592 and 540-542, 538)

Section 18 of Article XII. (Pltfs.' Ex. B-39, R. 613, 607; Interveners' Exs. 6 and 7, R. 598, 592 and R. 543, 538)

Sub-sections I and L of Section 10 of Article XIII. (Pltfs.' Ex. B-39, R. 614, 607; Interveners' Exs. 6 and 7, R. 599, 592 and 544-545, 538)

(2) *By-law recognizing leader's right to discharge sidemen of his orchestra.*

Section 10-K of Article III. (Pltfs.' Ex. B-39, R. 614, 607; Interveners' Exs. 6 and 7, R. 599, 592 and 544, 538)

(3) *By-laws recognizing leader's right to pay his sidemen and determine the amount of their compensation.*

Sections 23 and 48 of Article X. (Pltfs.' Ex. B-39, R. 610, 612, 607; Interveners' Exs. 6 and 7, R. 595, 597, 592 and 541, 543, 538)

(1) *By-laws recognizing leader as an independent contractor engaged in business for himself.*

Section 48 of Article X. (Pltfs.' Ex. B-39, R. 612, 613, 607; Interveners' Exs. 6 and 7, R. 597, 592 and 543, 538)

Section 10-C of Article XIII. (Pltfs.' Ex. B-39, R. 613, 607; Interveners' Exs. 6 and 7, R. 598, 592 and 544, 538)

The federal courts have held, in cases involving earlier forms of union contract which also incorporated by express reference the by-laws of the American Federation of Musicians, that Section 29 of Article X prohibits the existence of the relationship of employer and employee between an establishment owner and the sidemen of an orchestra notwithstanding other recitals in the contract purporting to create that relationship. *Williams v. United States*, 126 F. 2d 129 (C.C.A. 7th), *Los Angeles Athletic Club v. United States*, 54 F. Supp. 702 (S. D. Cal.) and *Spillson v. Smith*, (N. D. Ind.) C. C. H. Unemployment Service, Vol. 1, Par. 9111.

The district court, having concluded that each leader, and not the ballroom owners, was the employer of the members of his orchestra for the reasons stated in its opinion, did not find it necessary to pass on the question of whether the above mentioned by-laws were a part of the Form B contracts used to book the engagements involved in these actions. The Court of Appeals, however, because of its holding that the provisions of the Form B contract were conclusive of the relationship of the parties, necessarily was required to dispose of the question because of the contract's recital making such by-laws a part of the contract. It did so by holding that the statements of James C. Petrillo, President of the Musicians' Union, in his letter of May 1, 1941 (see page 21 of Pltfs.' Ex. B-37, R. 587, 582) to all locals that "this contract and none other must be used on all such engagements on and after June 1, 1941"

and "any member or any officer who assists a member in preparing a contract on any other form will be in violation of the laws of the American Federation of Musicians and will be subject to charges for such said violation" sufficiently required under the absolute powers vested in him by Section 1 of Article I of the by-laws, that the by-laws thereafter, as a union matter, be read in harmony and reconciliation with the relationship attempted to be created by the provision for control in the Form B contract. (R. 696)

Petitioners contend that this holding is in error for two reasons. The first is that the only way Petrillo could change existing by-laws under the extraordinary power given him by Section 1 of Article I was by the issuance of an executive order which "by its terms" annulled or set aside the same. Petrillo's said letter of May 1, 1941, since it mentioned neither the by-laws nor anything about nullifying or setting them aside, was obviously not an exercise of this power. To nevertheless hold, as the court below did, that such letter had the effect of nullifying the by-laws by implication, is to grant Petrillo a power not contemplated by said Section 1 of Article I. In this connection it must be borne in mind that the meaning and effect of the absolute power which said section granted Petrillo to *nullify* any by-law was such as to require the entire musical entertainment world and the performers therein to be bound by a contract which amounts to an agreement that the rights, duties and liabilities of parties thereto shall be whatever Petrillo may by his arbitrary, capricious or wise decision, decide and determine them to be. It was because of the shocking extent of this extraordinary power that the union in its grant thereof expressly provided the safeguard that the same should be exercised in one and only one way, namely, by an order which "by its terms" *annuls* or sets aside a by-law. Not having been

so exercised in the cases at bar, the power remained unexercised and the by-laws remained unchanged.

The second reason the majority opinion's said holding is in error is that at the time said letter was promulgated by Petrillo, neither he nor the American Federation of Musicians intended it to have the effect of nullifying any by-laws. The letter itself shows this to be true, not only because of the utter absence of any mention of the by-laws or any change therein, but also because its statement that "this contract and none other must be used on all such engagements on and after June 1, 1941", viewed in the light of the fact that the contract expressly incorporates by refence all by-laws as a part thereof, is as equally applicable to the contract's by-law provisions as it is to the contract's right of control provision. Being thus equivocal in nature, it furnishes no basis whatever for an inference that he intended the latter provision to supersede those containing the union by-laws. Moreover, the most the union's own witness ever claimed that Petrillo intended to accomplish was a revision and not a nullification of the by-laws. (R. 573)

Other circumstances which clearly show that neither Petrillo nor the union intended the former's letter of May 1, 1941 to have the effect ascribed to it by the majority opinion are the fact that the official copies of the federation's by-laws edited and published by its Secretary later in the year 1941 (Pltfs.' Ex. 7, R. 540-545, 538) and again in 1942 (Pltfs.' Ex. 6, R. 594-599, 592) contain the same verbatim by-laws as were claimed to have been nullified by such letter, and the fact that when the Secretary in July, 1941 officially certify to a revision of Section 29 of Article X (one of the by-laws claimed to have been nullified by Petrillo) he officially stated that such revision was *not intended to take effect until September 1, 1944!* (R. 605, 606; pp. 12 and 14 of Pltfs.' Ex. B-38, R. 615, 617, 614)

Surely the nullification by Petrillo by the exercise of his emergency powers of a score or more of by-laws which had been on the books for more than fifteen years would have been an event of such noteworthy importance that the Secretary, whose duty it was to publish in the union's official journal not later than July following adoption all by-law changes (Interveners' Ex. 7, R. 539, 538), would have caused the same to be reflected in his official publication of the by-laws for the years 1941 and 1942. That he did not do so, shows that the letter was not intended to have the effect which the majority opinion holds that it had.

Although the majority opinion of the court below held that the by-laws should not be treated or considered as a part of the contract by reason of Petrillo's proper exercise of "absolute" powers vested in him, it is noteworthy that the Circuit Court opinion claims that the effect of Petrillo's order was not *nullification* as provided for in Section 1 of Article I of the by-laws, but to "require . . . that the by-laws thereafter, as a union matter, be read in harmony and reconciliation with . . . the 'Form B' contract." It is difficult to see how this statement of the Circuit Court's opinion can be squared with the provision of the Form B contract itself reciting that "the musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians." Every one of the by-laws in question created an obligation of the orchestra members to the federation. For example, Section 29 of Article X bound them to accept employment from the leader and not the ballroom owners. The court below, in holding that the contract's provision regarding right of control made the sidemen the employees of the ballroom owners, was obviously guilty of a construction

of the contract which directly interfered with the foregoing obligation. The same thing is true with respect to all the other by-laws in question. Petitioners submit that the above mentioned clause required the court below to consider the by-laws as paramount to any conflicting provision in the contract. That is exactly the effect which district court in *Spillson v. Smith*, supra, gave to the very same clause in the form of union orchestra contract which immediately preceded the Form B contract.

B.

Assuming Petrillo's Letter of May 1, 1941 Did Constitute an Implied Repeal of the Then Existing By-Laws in Question, Such Repeal Did Not Nullify By-Laws of Like Content Which Were Re-Enacted at the Annual Convention of the American Federation of Musicians in June 1941 and Again at its Annual Convention in June 1942, and Were Therefore in Full Force and Effect at the Time Each of the Form B Contracts Involved in These Actions Was Executed.

The by-laws of the American Federation of Musicians making an orchestra leader the employer of the sidemen and prohibiting the existence of an employment relationship between them and an establishment owner were all re-enacted at that organization's forty-sixth annual convention held at Seattle, Washington, June 9-14, 1941 (R. 535, 536, Pltfs.' Ex. 7, R. 538, 540-541), which was nearly a month and a half after May 1, 1941, the date on which Petrillo's letter prescribing the use of the Form B contract was sent to all union locals. The earliest Form B contract used to book an engagement in the case at bar is dated June 25, 1941 (Pltfs.' Ex. W, R. 80, 82), which means that all of the Form B contracts involved herein were

executed after the dates of the union's Seattle convention and hence all the by-laws adopted at that meeting necessarily became a part of those contracts. The same by-laws were again re-enacted by the union the following year at its annual convention held at Dallas, Texas, June 8-13 (Pltfs.' Ex. 6, R. 592, 594-599). Several of the Form B contracts in the cases at bar were executed in the year 1942 after these dates. (Pltfs.' Ex. A, R. 141, 140, and Pltfs.' Exs. B-17 to B-23 incl., R. 221-245, 176)

It clearly appears from the foregoing record that even if it be assumed that Petrillo's letter of May 1, 1941 constituted an implied repeal of the by-laws in question existing on that date, such letter did not nullify by-laws of like content in force on the dates the Form B contracts involved herein were executed for the reason that all of such by-laws were re-enacted by the union at a time subsequent to the date of such letter and hence could not possibly have been affected by the alleged action of Petrillo taken prior to such time.

V.

The Circuit Court of Appeals is in Error in Holding that the Form B Contract on its Face Created the Relationship of Employer and Employee Between the Ballroom Owners and the Leaders and Members of Their Orchestras.

The decision of the court below that the Form B contract establishes on its face the legal relationship of employer and employee is based entirely on the assumption that its recital dealing with the right of control over the orchestra's services had the legal effect of vesting in the ballroom owners the right to control the means and manner of the performance of the orchestra members. Petitioners submit that a proper analysis of the exact language

of such recital in the light of other provisions in the contract shows this assumption to be wholly unwarranted. That language clearly states that the services over which control is granted are "the services to be rendered under the specifications of this contract." The only specifications of the contract are: (1) the place where the services are to be rendered, (2) the date on which they are to be performed, and (3) the duration of the same. These three specifications *are all matters pertaining to results to be accomplished. There is not a single specification in the Form B contract regarding the details of the work to be performed by the individual orchestra members.*

The manner of performance of their work not being "a specification of the contract" the contract provision as to control actually negatives rather than establishes an employment relationship between the sidemen and the ballroom proprietors. However viewed, the provision referred to is too indefinite to permit the interpretation that it granted control over the details of the work to be performed by the musicians under the contract. It cannot, by any stretch of the imagination, be said to have granted to petitioners the right of directing how or in what manner the sidemen in the orchestra should actually perform their services. In taking exactly this view of a similar provision of a written contract involved in the case of *Humpton v. Unterkircher & Sons*, 97 Iowa 509, 66 N. W. 776, the Supreme Court of Iowa said:

> "It is true that each contract provides that the work was to be done under the direction of the defendants, and their architect, and to their entire satisfaction, approval, and acceptance; but it is manifest that this direction, approval, and acceptance had reference to the time within which it should be performed, with reference to other parts of the work, and to the results to be accomplished, and not to the method or manner in which it should be performed. Defendants had no control over the men who should be employed by

either of these contractors. They could not say who should be employed, or who discharged. They had the right, under their contracts, to say what should be done, but not how it should be brought about, or who should do it."

There are still other striking deficiencies in the Form B contract which would have to be considered if it were to be looked upon as determinative evidence. Other than the establishment, there are no other signatory parties except the leader or his booking agent. No provision is made for any sideman's signature on the contract. It is the leader who specifies on the contract the amount of pay to be received by each member of the orchestra and therefore has, on the face of it, the right to control that matter.

CONCLUSION.

For all of the reasons stated writs of certiorari should be granted in these causes and this court should review the decision of the Eighth Circuit Court of Appeals and finally reverse it.

Respectfully submitted,

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APPENDIX A.

STATUTES AND REGULATIONS.

Section 1426 of the Internal Revenue Code, as amended by Section 606 of Social Security Act Amendments of 1939 (26 U. S. C., Sec. 1426): "DEFINITIONS.

* * * * * * * * *

"(b) *Employment.* The term 'employment' means * * * any service, of whatever nature, performed * * * by an employee for the person employing him." * * *

* * * * * * * * *

The definition of employment in Section 1607 (c), Internal Revenue Code, as amended by Section 614 of the Social Security Act Amendments of 1939, is identical.

Treasury Regulations 106, pertaining to the Federal Insurance Contributions Act:

"Sec. 402.204. *Who are employees.* Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

"Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another

merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee.

"Generally, physicians, lawyers, dentists, veterinarians contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

"Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

"If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, co-adventurer, agent, or independent contractor.

"The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

"No distinction is made between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees. An officer of a corporation is an employee of the corporation but a director as such is not. A director may be an employee of the corporation, however, if he performs services for the corporation other than those required by attendance at and participation in meetings of the board of directors.

"Although an individual may be an employee under this section, his services may be of such a nature, or performed under such circumstances, as not to constitute employment within the meaning of the Act . . ."

Treasury Regulations 107, Section 403.204, pertaining to the Federal Unemployment Tax Act, are identical.